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SUE FIRST, ASK QUESTIONS LATER: WHAT THE RECENT EQUITABLE ESTOPPEL DECISIONS MEAN FOR ATTORNEYS IN SOUTH CAROLINA

I. INTRODUCTION

The doctrine of equitable estoppel has long been associated with the age-old maxim that “no man may take advantage of his own wrong.”¹ This doctrine can be applied if an individual, by representing facts or concealing material facts, causes another person to change his position to the detriment of the other person.² The key to equitable estoppel is whether the party asserting estoppel has been “misled to his injury.”³ Because this misleading is an important element, equitable estoppel cannot be applied when “the knowledge of both parties is equal, and nothing is done by the one to mislead the other.”⁴

Recently, in *Black v. Lexington School District Two*⁵ the South Carolina Supreme Court denied the plaintiff’s equitable estoppel argument because “settlement negotiations or statements expressing interest in settlement are insufficient to give rise to a claim that a defendant is equitably estopped from asserting the statute of limitations.”⁶ The court found that an affidavit submitted by the plaintiff’s attorney was not sufficient to create an issue of fact concerning equitable estoppel because the affidavit contained only assertions that the defendant had expressed an interest in settling the case.⁷ Although the *Black* court indicated that statements expressing intent of settlement are not sufficient for a finding of estoppel, the court did not elaborate on what type of conduct by the defendant would sustain an estoppel argument.⁸ Further, the court adhered to its ruling in *Gaymon v. Richland Memorial Hospital*.⁹ equitable estoppel is an issue for the

1. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959).

2. *Hubbard v. Beverly*, 197 S.C. 476, 481, 15 S.E.2d 740, 742 (1941) (finding that the plaintiff could not have been misled because he knew when he executed his will that he had already conveyed the land at issue to someone else in fee simple).

3. *South Carolina Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981).

4. *Helsel v. City of N. Myrtle Beach*, 307 S.C. 24, 28, 413 S.E.2d 821, 824 (1992).

5. 327 S.C. 55, 488 S.E.2d 327 (1997).

6. *Id.* at 63, 488 S.E.2d at 331.

7. *Id.* at 65, 488 S.E.2d at 332.

8. *Id.* at 63-64, 488 S.E.2d at 331-32.

9. 327 S.C. 66, 488 S.E.2d 332 (1997).

judge, not the jury.¹⁰

This Note will review *Black* and *Gaymon* and then discuss the current state of South Carolina jurisprudence on equitable estoppel. Part II of this Note briefly describes these two cases and considers what conduct on the part of the defendant triggers the application of estoppel. Part III considers whether the court's decision that settlement negotiations are insufficient to trigger estoppel is contrary to the policy of encouraging settlement. Part IV discusses the court's ruling that equitable estoppel is an issue for the judge and compares *Gaymon* to decisions of the federal courts that allow equitable estoppel to go to the jury. Finally, this Note concludes by suggesting ways in which attorneys can protect their clients during settlement negotiations.

II. BACKGROUND

A. *Black v. Lexington School District Two*

In *Black* the plaintiff, Christopher Black, was injured at Brookland-Cayce High School on March 27, 1991.¹¹ Although the statute of limitations had run by August 8, 1993,¹² Black's attorney did not serve a complaint on the school district until February 8, 1995.¹³ The complaint alleged that the school district should be equitably estopped from asserting a defense based on the statute of limitations because the district had induced Black not to file a complaint.¹⁴ At the initial summary judgment hearing, Black attempted to present an affidavit from his original lawyer¹⁵ in support of his claim of equitable estoppel.¹⁶ "Although the document was a sworn statement, it did not comply with South Carolina's requirements for a valid affidavit because it was not notarized."¹⁷ The judge granted

10. *Black*, 327 S.C. at 62 n.1, 488 S.E.2d at 330-31 n.1.

11. *Id.* at 57, 488 S.E.2d at 328.

12. Under the South Carolina Tort Claims Act, the statute of limitations for tort claims against a government entity runs for two years. S.C. CODE ANN. § 15-78-100(a) (Law. Co-op. Supp. 1997). The statute of limitations is extended for another year when the claimant files a "verified claim" pursuant to section 15-78-80. *Id.* Additionally, when the claimant is a minor, the statute is tolled until the claimant reaches majority. *Black*, 327 S.C. at 58, 488 S.E.2d at 328. Black, who was seventeen at the time of the injury, reached majority on August 8, 1991. *Id.* at 57, 488 S.E.2d at 328. Because he never filed a verified claim, the statutory period ended on August 8, 1993. *Id.* at 58, 488 S.E.2d at 328.

13. *Black*, 327 S.C. at 58, 488 S.E.2d at 328.

14. *Id.*

15. *Id.* Although Black's first lawyer and the school district's insurance company had discussed Black's claim, Black obtained new counsel before the school district's original summary judgment hearing. *Id.*

16. *Id.* A revised affidavit alleged that the school district's insurance carrier had indicated that both the school district and the carrier were interested in settling the case. The affidavit also alleged that the carrier's agent had indicated that he was confident that the matter could be settled if he could complete the investigation and so there was no need to initiate litigation. *Id.* at 65, 488 S.E.2d at 332.

17. *Id.* at 58, 488 S.E.2d at 328. Rule 11 of the South Carolina Rules of Civil Procedure provides:

Affidavits or verifications authorized or permitted under these Rules shall be

Black a continuance and gave him the opportunity to “obtain a valid affidavit from his former attorney.”¹⁸ However, at a second hearing, the trial court found that the affidavit had not been timely served and thus was not considered.¹⁹ As a result, the judge granted the school district’s motion for summary judgment, concluding that the statute of limitations had run.²⁰ The supreme court found that the trial court had not abused its discretion by refusing to consider the affidavit.²¹ The court further opined that the school district would have been granted summary judgment even if the affidavit had been admitted because the affidavit did not create an issue of material fact regarding equitable estoppel.²²

In making its decision, the *Black* court looked at prior South Carolina decisions to determine whether the conduct of the school district or its insurance claims adjuster was such that the doctrine of equitable estoppel would prevent it from alleging the statute of limitations as a defense.²³ Under South Carolina law, “[a] defendant may be estopped from claiming the statute of limitations as a defense if ‘the delay that otherwise would give operation to the statute had been induced by the defendant’s conduct.’”²⁴ Further the court noted in *Wiggins v. Edwards*²⁵ that

written statements or declarations by a party or his attorney of record or of a witness, sworn to or affirmed before an officer authorized to administer oaths, that the affiant knows the facts stated to be true of his own knowledge, except as to those matters stated on information and belief and as to those matters that he believes them to be true.

S.C. R. Civ. P. 11(c).

18. *Black*, 327 S.C. at 58, 488 S.E.2d at 328. Rule 56 of the South Carolina Rules of Civil Procedure provide:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

S.C. R. Civ. P. 56(f).

19. *Black*, 327 S.C. at 58, 488 S.E.2d at 328-29. At this second hearing, Black’s attorney faxed a notarized affidavit to the school district’s attorney just three hours before the beginning of the hearing. The school district argued that the affidavit was not served in accordance with Rule 56 of the South Carolina Rules of Civil Procedure. The trial court agreed and refused to consider the affidavit. *Id.* According to Rule 56(c), “[t]he adverse party may serve opposing affidavits not later than two days before the hearing.” S.C. R. Civ. P. 56(c).

20. *Black*, 327 S.C. at 58-59, 488 S.E.2d at 329.

21. Following previous decisions, the court ruled that a “trial court may refuse to consider materials that were not timely served such that the opposing party had no time to prepare a response.” *Id.* at 60, 488 S.E.2d at 329.

22. *Id.* at 65, 488 S.E.2d at 332.

23. *Id.* at 61-63, 488 S.E.2d at 330-32 (citing *Vines v. Self Mem’l Hosp.*, 314 S.C. 305, 443 S.E.2d 909 (1994); *Gadsden v. Southern R.R.*, 262 S.C. 590, 206 S.E.2d 882 (1974); *Moates v. Bobb*, 322 S.C. 172, 470 S.E.2d 402 (Ct. App. 1996); *Dillon County Sch. Dist. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985)).

24. *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994) (quoting *Dillon County Sch. Dist. Two*, 286 S.C. at 218, 332 S.E.2d at 561).

25. 314 S.C. 126, 422 S.E.2d 169 (1994).

this inducement could be in the form of express statements which indicate that the claim will be settled or through actions which suggest that litigation is not necessary.²⁶ Although less than a direct promise not to litigate may be enough to warrant estoppel, a defendant's expressed interest in settlement or in unfinalized settlement negotiations with the plaintiff will not estop a statute of limitations defense.²⁷ However, the court of appeals had previously applied estoppel in a case in which assertions that litigation would not be necessary were accompanied by additional conduct on the part of the defendant.²⁸

In *Black* the only evidence to support the plaintiff's estoppel claim was the attorney's affidavit and some letters sent from the attorney to the school district's claims adjuster.²⁹ The attorney's affidavit merely indicated that the school district was "interested in settling the case."³⁰ The court found that these statements did not present a genuine issue of material fact about whether the defendant had induced the plaintiff to delay bringing a claim.³¹ Thus, the court affirmed the order of the circuit court granting summary judgment to the school district.³²

B. Gaymon v. Richland Memorial Hospital

The *Black* court also reaffirmed its recent decision in *Gaymon v. Richland Memorial Hospital*,³³ which adopted a new rule, that equitable estoppel is a question of fact to be decided by a judge.³⁴ In *Gaymon* the plaintiffs commenced slip and fall cases against Richland Memorial Hospital.³⁵ The "[h]ospital asserted the statute of limitations as an affirmative defense" and "moved for summary judgment."³⁶ "The trial judge denied summary judgment finding [the plaintiffs] had raised issues of fact regarding" equitable estoppel.³⁷ Although the hospital requested that the issue of equitable estoppel be tried separately by the court in equity, the trial judge refused and ruled that a jury should try the issue.³⁸ The supreme court reversed, holding that the issue was one for a court in equity.³⁹ Accordingly, to reach a jury

26. *Id.* at 130, 422 S.E.2d at 171.

27. *Moates*, 322 S.C. at 175, 470 S.E.2d at 403.

28. *Dillon County Sch. Dist. Two*, 286 S.C. at 219, 332 S.E.2d at 562. In *Dillon County School District Two* the court of appeals found that the defendant's visits to the school to discuss and investigate the repairs needed and the defendant's repeated attempts to fix the roof indicated that the roof would be fixed without resort to litigation. *Id.*

29. *Black v. Lexington Sch. Dist. Two*, 327 S.C. 55, 64, 488 S.E.2d 327, 332 (1997).

30. *Id.* at 65, 488 S.E.2d at 332 (quoting the affidavit).

31. *Id.*

32. *Id.*

33. 327 S.C. 66, 488 S.E.2d 332 (1997).

34. *Black*, 327 S.C. at 62 n.1, 488 S.E.2d at 330-31 n.1.

35. *Gaymon*, 327 S.C. at 67, 488 S.E.2d at 333.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 68, 488 S.E.2d at 333. The South Carolina Supreme Court opined that the cases relied

under *Gaymon*, a plaintiff must do more than raise an issue of material fact concerning estoppel.

III. THE SPECTRUM OF EQUITABLE ESTOPPEL: WHERE TO DRAW THE LINE?

A. *Knowledge and Reliance: A Gray Area*

The party seeking to assert equitable estoppel bears the burden of proof.⁴⁰ That party must establish “(1) [its own] lack of knowledge and the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped”;⁴¹ (3) “conduct by the party estopped which amounts to a false representation or concealment of material facts”;⁴² (4) “the intention [by the party to be estopped] that such conduct shall be acted upon by the other party; and [(5) the estopped party’s] knowledge, actual or constructive, of the true facts.”⁴³ These elements can be reduced to and considered as knowledge and reliance on conduct.

1. *Knowledge of the Parties*

For a plaintiff to successfully assert equitable estoppel, the defendant must have some knowledge, actual or constructive, that the plaintiff lacks.⁴⁴ For example, courts have estopped defendants from asserting the statute of limitations in workers’ compensation cases when the plaintiff’s inexperience and lack of education led the plaintiff to believe that the claim was being handled.⁴⁵ In *Clements v. Greenville County*⁴⁶ the South Carolina Supreme Court found that the plaintiff, an employee at one of the correctional institutions in Greenville County, was misled by his employer into believing that his employer would take care of his workers’ compensation claim.⁴⁷ The court noted that the plaintiff was sixty-two years old and had only completed the seventh grade.⁴⁸ The court also applied equitable estoppel

on by the trial court should be read “for the proposition that equitable estoppel may involve a question of fact for the fact-finder.” *Id.* The appropriate fact finder, however, is the judge and not the jury. *Id.*

40. *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992).

41. *Id.* at 203-04, 420 S.E.2d at 859.

42. *Id.* at 203, 420 S.E.2d at 859. However, the party against whom estoppel is being asserted need not have intentionally deceived the party invoking estoppel. *See, e.g., Lovell v. C.A. Timbes, Inc.*, 263 S.C. 384, 389, 210 S.E.2d 610, 612 (1974) (“In order to constitute estoppel it is not necessary to establish deception, fraud, bad faith or an intent to deceive . . .”); *Clements v. Greenville County*, 246 S.C. 20, 23, 142 S.E.2d 212, 213 (1965) (noting that estoppel can arise from intentional or unintentional deception).

43. *Id.*

44. *See id.*

45. *See, e.g., Lovell*, 263 S.C. at 389, 210 S.E.2d at 612 (noting that the worker’s inexperience and limited education would be considered by the court).

46. 246 S.C. 20, 142 S.E.2d 212 (1965).

47. *Id.* at 25, 142 S.E.2d at 214.

48. *Id.* at 23, 142 S.E.2d at 213.

in a similar case in which the plaintiff informed his employer of his injury and was then told to obtain the correct forms from the insurance agent, which the employer filed.⁴⁹ Later, an adjuster spoke to the plaintiff and took his statement, but never contacted the plaintiff again.⁵⁰ After the limitations period had run, the insurer denied the claim and mailed a letter to the plaintiff informing him of their decision.⁵¹ The claimant had never filed a claim before, and only three other claims had ever been filed by the employer.⁵² As in *Clements*, the supreme court considered the plaintiff's lack of education and experience in deciding that he was misled by both the insurance agent and his employer.⁵³

Next, the plaintiff must also demonstrate that the party against whom estoppel is being asserted had "knowledge, actual or constructive, of the real facts."⁵⁴ In *Brayboy v. Ewing*⁵⁵ the plaintiff asserted that the defendant's conduct prevented her from filing suit within the statute of limitations period.⁵⁶ The South Carolina Court of Appeals found that the defendant doctor did not have the requisite knowledge and was not equitably estopped from asserting the statute of limitations when the plaintiff's condition could have resulted from many different causes and when the evidence did not show that the defendant had conclusive knowledge of the plaintiff's problems.⁵⁷

Once a party has retained counsel, it is less likely that equitable estoppel will be applied against the other party because an attorney may be presumed to have access to the material facts of the case and, therefore, "the means of knowledge of the truth as to the facts in question."⁵⁸ However, a court may also find that an attorney has been misled and that estoppel is still applicable. In *United States v. Fidelity & Casualty Co.*⁵⁹ the Fourth Circuit ruled that "[a]n attorney may be justifiably lulled into a sense of false security as much as his client."⁶⁰ For example, when the plaintiff has been misled on a matter of engineering, rather than a matter of law, "lawyers have no special expertise in engineering . . . [and, as a result,] presence of counsel is of little relevance in determining whether plaintiff reasonably relied on the words and conduct of defendant."⁶¹ Thus, South Carolina courts may find that the knowledge requirement is met when an attorney alleges to have been

49. *Lovell*, 263 S.C. at 387, 210 S.E.2d at 611.

50. *Id.*

51. *Id.* at 388, 210 S.E.2d at 611.

52. *Id.* at 389, 210 S.E.2d at 612.

53. *Id.* at 389-90, 210 S.E.2d at 612-13.

54. *Southern Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth.*, 305 S.C. 507, 511, 409 S.E.2d 428, 430 (Ct. App. 1991) (quoting *Frady v. Smith*, 247 S.C. 353, 359, 147 S.E.2d 412, 415 (1966)).

55. 311 S.C. 272, 428 S.E.2d 731 (Ct. App. 1993).

56. *Id.* at 274, 428 S.E.2d at 733.

57. *Id.* at 275, 428 S.E.2d at 733.

58. *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992).

59. 402 F.2d 893 (4th Cir. 1968).

60. *Id.* at 899.

61. *City of Bedford v. James Leffel & Co.*, 558 F.2d 216, 219 n.17 (4th Cir. 1977).

misled on a nonlegal issue.

2. *Reliance*

In addition to the knowledge element, a plaintiff must show reliance on the conduct of the party to be estopped.⁶² South Carolina courts have often ruled that the reliance element has been met when the plaintiff was an employee of the defendant.⁶³ The supreme court has tied reliance to the knowledge element, implying that a plaintiff-employee with little knowledge and experience outside of the skills required to perform the job is likely to rely on the employer to take care of all job-related matters, especially those concerning work-related injuries.⁶⁴ The plaintiff does not have to be of limited education or experience, however, to satisfy the reliance element. For example, in *Oswald v. County of Aiken*⁶⁵ the plaintiff served as a deputy sheriff in a busy mobile crime lab.⁶⁶ The sheriff's department normally allowed deputies to accumulate overtime and then later take time off from work by crediting this time against their overtime.⁶⁷ The department paid the deputies for any unused overtime when they left the department.⁶⁸ Oswald, unable to use all of his overtime before he left the department, requested payment for the unused hours when he resigned; the county, however, refused to compensate him.⁶⁹ The court of appeals found that the plaintiff had relied on the department's policy of overtime compensation and that the plaintiff had worked extra hours in expectation of payment for unused overtime.⁷⁰ As a result, the county was estopped from denying that it had a policy of paying deputies for unused compensatory time when they left the department.

A court will not always find reliance, however, simply because the defendant assisted the plaintiff in filing a claim or because the plaintiff possessed less knowledge than the defendant about filing claims.⁷¹ In *Vines v. Self Memorial Hospital*, a non-employment situation, the South Carolina Supreme Court found no evidence "that [the plaintiff] delayed filing suit in reliance on [the defendant's]

62. *Johns*, 309 S.C. at 203-04, 420 S.E.2d at 859.

63. *See Lovell v. C.A. Timbes, Inc.*, 263 S.C. 384, 210 S.E.2d 610 (1974); *Clements v. Greenville County*, 246 S.C. 20, 142 S.E.2d 212 (1965); *Oswald v. County of Aiken*, 281 S.C. 298, 315 S.E.2d 146 (Ct. App. 1984).

64. *See Lovell*, 263 S.C. at 389, 210 S.E.2d at 612; *see also supra* text accompanying notes 47-53.

65. 281 S.C. 298, 315 S.E.2d 146 (Ct. App. 1984).

66. *Id.* at 301, 315 S.E.2d at 149.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 306, 315 S.E.2d at 151-52.

71. *See, e.g., Vines v. Self Mem'l Hosp.*, 314 S.C. 305, 308, 443 S.E.2d 909, 911 (1994) (rejecting plaintiff's argument that the hospital staff's completion of her claim forms estopped the hospital from asserting a statute of limitations defense).

conduct.”⁷² In *Vines* the defendant hospital’s employees assisted the plaintiff in completing claims forms.⁷³ However, because the forms were not notarized, they did not comply with the Tort Claims Act.⁷⁴ Therefore, the plaintiff was only entitled to a two year statute of limitations,⁷⁵ and the plaintiff did not file her claim within the statutory period.⁷⁶ The plaintiff alleged that the hospital was estopped from asserting the statute of limitations because hospital staff helped her complete the claims forms, causing “her to believe she had done all that she needed to do.”⁷⁷ The court disagreed and held that the plaintiff had not delayed filing suit based on the defendant’s conduct because “her husband informed Hospital personnel that he did not intend to release it from liability,” and because the plaintiff retained an attorney before the statute of limitations had run.⁷⁸

In *United States v. Fidelity & Casualty Co.*,⁷⁹ though, the Fourth Circuit found that the reliance element of equitable estoppel may be satisfied even when the plaintiff has retained counsel.⁸⁰ However, “an attorney may not in some circumstances be justified in relying upon representations made to him, where a less sophisticated citizen would still have access to the estoppel doctrine.”⁸¹ Ultimately, employment of an attorney is, of course, only one factor courts consider in determining whether a plaintiff reasonably relied on the defendant’s representations.⁸²

B. Defendant’s Conduct in Settlement Negotiations

The South Carolina courts have clearly articulated that plaintiffs may not rely on settlement negotiations alone when asserting equitable estoppel.⁸³ As discussed earlier, in *Black v. Lexington School District Two* the supreme court did not discuss whether the elements of knowledge or reliance were met, rather it simply stated that “settlement negotiations or statements expressing interest in settlement are insufficient to give rise to a claim that a defendant is equitably estopped from asserting the statute of limitations.”⁸⁴

Generally, the South Carolina Supreme Court ruled in *Rink v. Richland*

72. *Id.* at 308, 443 S.E.2d at 911.

73. *Id.* at 307, 443 S.E.2d at 910.

74. *Id.*

75. *Id.*; see *supra* note 12.

76. See *Vines*, 314 S.C. at 307, 443 S.E.2d at 910.

77. *Id.* at 308, 443 S.E.2d at 911 (quoting the plaintiff).

78. *Id.* at 308-09, 443 S.E.2d at 911.

79. 402 F.2d 893 (4th Cir. 1968).

80. *Id.* at 899.

81. *Id.*

82. *Id.* at 900 n.9.

83. See, e.g., *Gadsden v. Southern R.R.*, 262 S.C. 590, 206 S.E.2d 882 (1974) (finding that negotiations had been initiated but not finalized).

84. *Black v. Lexington Sch. Dist. Two*, 327 S.C. 55, 63, 488 S.E.2d 327, 331 (1997).

*Memorial Hospital*⁸⁵ that the plaintiff was barred from bringing a second suit after his first suit had been dismissed without prejudice because the statute of limitations had run.⁸⁶ The *Rink* court quoted *Clements v. Greenville County*⁸⁷ with approval in stating that equitable estoppel is generally applied “when the plaintiff has been induced or relies on the defendant’s conduct or promises that a settlement will be made and does not file suit until the statute of limitations has run.”⁸⁸

However, subsequent decisions by the supreme court and court of appeals have opined that unfinalized settlement negotiations are not sufficient evidence to estop a defendant from asserting a statute of limitations defense.⁸⁹ In *Gadsden v. Southern Railroad* settlement negotiations were undertaken but never finalized.⁹⁰ The South Carolina Supreme Court concluded that equitable estoppel was not applicable because “‘there was no promise orally and certainly not in writing to waive or not to plead the statute,’ [and] there [was] no evidence that the defendant made any misrepresentations or misled the plaintiff or her counsel.”⁹¹

More recently, the court of appeals found in *Moates v. Bobb* that equitable estoppel was not applicable when an insurance company sent the plaintiff’s attorney a check with a note stating that the check was “‘an advance[ment] towards the settlement’ of the claim.”⁹² The court stated that “[a] review of the record in this case shows [plaintiff’s attorney] did not even *begin* settlement negotiations, let alone finalize them.”⁹³ However, the South Carolina Court of Appeals has concluded that negotiations accompanied by other acts may be sufficient to estop the use of the statute of limitations as a defense.⁹⁴ In *Dillon County School District Two v. Lewis Sheet Metal Works, Inc.* the court of appeals ruled that some of the defendants were equitably estopped from asserting the statute of frauds as a defense because the defendants designed and constructed a roof for the high school, and then once defects in the roof were discovered, the defendants assured the plaintiff that the roof would be repaired so that litigation would be unnecessary.⁹⁵ The

85. 310 S.C. 193, 422 S.E.2d 747 (1992).

86. *Id.* at 197, 422 S.E.2d at 749. The plaintiff argued that when the court granted him a voluntary dismissal, the order stated that a more detailed order regarding costs taxed against the plaintiff would be forthcoming and that he could not pay or refile until the more detailed order was issued. The plaintiff did file before the more detailed order was issued, but after the statute of limitations had run. *Id.*

87. 246 S.C. 20, 142 S.E.2d 212 (1965).

88. *Rink*, 310 S.C. at 198, 422 S.E.2d at 749.

89. See *Gadsden v. Southern R.R.*, 262 S.C. 590, 592, 206 S.E.2d 882, 883 (1974); *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996).

90. *Gadsden*, 262 S.C. at 592, 206 S.E.2d at 883.

91. *Id.* (quoting the lower court).

92. *Moates*, 322 S.C. at 174, 470 S.E.2d at 403 (quoting the note).

93. *Id.* at 175, 470 S.E.2d at 403.

94. *Dillon County Sch. Dist. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), *overruled on other grounds by* *Atlas Food Sys. & Servs., Inc. v. Crane Nat’l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995).

95. *Id.* at 219, 332 S.E.2d at 562.

defendants' assurances were accompanied by visits to the school and "numerous attempts to repair the roof."⁹⁶ The court found that the defendants' other acts were sufficient to induce the plaintiff to delay filing a claim.⁹⁷

South Carolina courts have yet to address whether estoppel should apply when settlement negotiations are in the final stages at time the statute of limitations runs and then negotiations are broken off or breached by the defendant. The court may find that "the delay that otherwise would give operation to the statute had been induced by the defendant's conduct"⁹⁸ and that estoppel could therefore be applied. Additionally, if the plaintiff could establish that the defendant had undertaken the negotiations in bad faith, the court may estop the defendant from asserting the statute of limitations defense.⁹⁹ However, given the court's general approach to settlement negotiations and claims of estoppel, the court is unlikely to apply estoppel in cases involving bad faith when negotiations are in the early stages, or when the parties have only expressed an interest in settlement.

The South Carolina rulings which conclude that settlement negotiations are not sufficient to establish equitable estoppel suggest that a plaintiff should file a claim even if it appears that settlement will be reached.¹⁰⁰ These rulings discourage settlement negotiations, contrary to the policies of the state¹⁰¹ and federal courts.¹⁰² "Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by courts."¹⁰³ Given this generally accepted policy, perhaps South Carolina courts should reconsider their prior decisions that unfinalized settlement negotiations do not bar the use of the statute of limitations as a defense to assertions

96. *Id.*

97. *Id.*

98. *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994) (quoting *Dillon County Sch. Dist. Two*, 286 S.C. at 218, 332 S.E.2d at 561).

99. See *Black v. Lexington School District Two*, 327 S.C. 55, 64, 488 S.E.2d 327, 331-32 (1997), citing *Lockard v. Deitch*, 855 S.W.2d 104 (Tex. Ct. App. 1993), for the proposition that "settlement negotiations between a plaintiff and defendant do not constitute a waiver of the defendant's right to assert the statute of limitations."

100. See *Gadsden v. Southern R.R.*, 262 S.C. 590, 206 S.E.2d 882 (1974); *Moates v. Bobb*, 322 S.C. 172, 470 S.E.2d 402 (Ct. App. 1996).

101. *Darden v. Witham*, 258 S.C. 380, 388, 188 S.E.2d 776, 778 (1972) ("The courts favor settlements and agreements amongst litigants, and regard as commendable efforts by the parties to settle their differences without the courts' intervention or assistance.")

102. See *Marek v. Chesny*, 473 U.S. 1, 5 (1985) ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation."); *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) ("[P]rivate structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount."); *Bergh v. Department of Transp.*, 794 F.2d 1575, 1577 (Fed. Cir. 1986) ("The law favors settlement of cases."); *United States v. Fidelity & Cas. Co.*, 402 F.2d 893, 899 (4th Cir. 1968) ("To adopt a rule that employment of counsel precludes resort to equitable estoppel would constitute a departure from the salutary-policy of encouraging the amicable settlement of legal disputes without resort to the courts . . .").

103. *D.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997).

of equitable estoppel.

Finally, although South Carolina courts should reconsider whether settlement negotiations alone are per se insufficient to merit equitable estoppel, *Black* presents a case in which the court's finding was appropriate. The school district's claims adjuster did not misrepresent settlement opportunities to the plaintiff's attorney.¹⁰⁴ Arguably, the claims adjuster might have known whether settlement would actually take place before the running of the statute. However, according to the untimely affidavit of Black's former lawyer, the adjuster merely stated that "he was confident [they] could settle this matter if he had an opportunity to complete an investigation."¹⁰⁵ The attorney was a knowledgeable party. He should have known that claims adjusters generally assert that settlements seem possible, especially when the alternative is costly litigation. Furthermore, the adjuster in *Black* "did not accept liability on behalf of the school district."¹⁰⁶ The attorney could have pressed the adjuster to come to a settlement, or he could have discussed settlement with the school district before the statute of limitations ran.

IV. SHOULD EQUITABLE ESTOPPEL BE AN ISSUE FOR THE JUDGE OR THE JURY?

In *Gaymon v. Richland Memorial Hospital* the supreme court held that equitable estoppel is an issue to be decided by the judge rather than the jury.¹⁰⁷ This decision is a departure from a prior line of cases which noted that equitable estoppel was a question of fact for the jury.¹⁰⁸ South Carolina courts had generally held that equitable issues are for the judge and issues of fact are for the jury.¹⁰⁹ In *Floyd v. Floyd*¹¹⁰ the South Carolina Supreme Court stated:

In a line of cases dating back almost a century our Court has held, with only slight modifications, that where the issues raised by pleadings are partly equitable, it is not error to deny a motion to have all the issues tried by jury, though the right exists to have purely legal questions so tried.¹¹¹

104. See *Black*, 327 S.C. at 65, 488 S.E.2d at 332.

105. *Id.* (quoting the affidavit of Black's original lawyer)

106. *Id.* (quoting the affidavit of Black's original lawyer) (emphasis omitted).

107. *Gaymon v. Richland Mem'l Hosp.*, 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997).

108. See *Vines v. Self Mem'l Hosp.*, 314 S.C. 305, 309, 443 S.E.2d 909, 911 (1994); *Koren v. National Home Life Assurance Co.*, 277 S.C. 404, 407, 288 S.E.2d 392, 394 (1982); *Lovell v. C. A. Timbes, Inc.*, 263 S.C. 384, 389-90, 210 S.E.2d 610, 612 (1974); *Dillon County Sch. Dist. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 219, 332 S.E.2d 555, 561 (Ct. App. 1985), *overruled on other grounds by* *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995); *Oswald v. County of Aiken*, 281 S.C. 298, 303-04, 315 S.E.2d 146, 150 (Ct. App. 1984).

109. See, e.g., *Johnson v. South Carolina Nat'l Bank*, 292 S.C. 51, 56, 354 S.E.2d 895, 897 (1987) ("If [legal and equitable] claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims . . .").

110. 306 S.C. 376, 412 S.E.2d 397 (1991).

111. *Id.* at 379, 412 S.E.2d at 398.

Over the years South Carolina courts had modified this general rule in cases dealing with equitable estoppel.¹¹² The supreme court seemed to agree that “[equitable estoppel] is a question of fact for the jury whether the acts, representations, . . . lulled the plaintiff into a sense of security, preventing him from filing suit before the running of the statute.”¹¹³

However, in *Gaymon* the supreme court returned to its general view that equitable issues are to be decided by the judge. The *Gaymon* court found that the prior decisions indicating that equitable estoppel was “a question of fact for the jury” were not dispositive because those cases did not rule specifically on whether equitable estoppel was an issue for the jury or for the court sitting in equity.¹¹⁴ The court opined that while those cases were “correctly cited for the proposition that equitable estoppel may involve a question of fact for the fact finder, it is mere dictum that such a question of fact is for a jury.”¹¹⁵ The *Gaymon* court relied on older South Carolina case law¹¹⁶ and the more recent decision in *Floyd*¹¹⁷ in determining that when equitable estoppel is combined in a case with issues of law, the estoppel issue should be tried by the court.¹¹⁸ This finding was reiterated by the court in *Black*.¹¹⁹

In contrast, federal courts have placed an emphasis on protecting the right to a jury trial. In *Beacon Theatres, Inc. v. Westover*,¹²⁰ the United States Supreme Court noted “that only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.”¹²¹ Indeed, the federal courts have been inclined to expand the role of the jury and to make jury trials more widely available.¹²² For example, in *Overstreet v. Kentucky Central Life Insurance Co.*¹²³ the Fourth Circuit has ruled that a defendant’s conduct may raise an issue of material fact for the jury regarding equitable estoppel.¹²⁴ In short, “[t]here is some authority in the states for refusing to allow the extension of

112. See *Vines*, 314 S.C. at 309, 443 S.E.2d at 911; *Lovell*, 263 S.C. at 389-90, 210 S.E.2d at 612; *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 61, 156 S.E.2d 318, 319 (1967); *Dillon County Sch. Dist. Two*, 286 S.C. at 219, 332 S.E.2d at 561.

113. *Lovell*, 263 S.C. at 389-90, 210 S.E.2d at 612 (quoting 51 AM. JUR. 2D *Limitation of Actions* § 433 (1970)).

114. *Gaymon v. Richland Mem’l Hosp.*, 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997).

115. *Id.*

116. *Id.* (citing *Knight v. Stroud*, 212 S.C. 39, 46 S.E.2d 169 (1948); *Atlantic & Charlotte Air Line Ry. Co. v. Victor Mfg. Co.*, 79 S.C. 266, 60 S.E. 675 (1908); *Quattlebaum v. Taylor*, 45 S.C. 512, 23 S.E. 617 (1896)).

117. *Id.* (citing *Floyd v. Floyd*, 306 S.C. 376, 412 S.E.2d 397 (1991)).

118. *Id.* at 68, 488 S.E.2d at 333.

119. *Black v. Lexington Sch. Dist. Two*, 327 S.C. 55, 62 n.1, 488 S.E.2d 327, 330-31 n.1 (1997).

120. 359 U.S. 500 (1959).

121. *Id.* at 511.

122. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2302.1, at 33 (2d ed. 1995) (“In its decisions since 1962 the Court has shown no inclination to retreat from this judgment that jury trial is now more widely available than it had been in the past.”).

123. 950 F.2d 931 (4th Cir. 1991).

124. *Id.* at 942.

jury trial to matters that historically were equitable, but this has never been the rule in the federal courts.”¹²⁵

If a South Carolina practitioner brings an action in federal court or removes an action to federal court, then based on *Byrd v. Blue Ridge Rural Electric Cooperative*¹²⁶ and *Hanna v. Plumer*,¹²⁷ it would appear that the issue of equitable estoppel will go to the jury.¹²⁸ The *Byrd* Court stressed the strong federal policy favoring jury trials and reiterated that “state laws cannot alter the essential character or function of a federal court.”¹²⁹ The Supreme Court subsequently ruled in *Hanna* that when a Federal Rule of Civil Procedure governed an issue, the federal rule would prevail over a state rule.¹³⁰ In dicta, the court stated that when a federal rule is not involved, the court should apply state law if applying a different law in federal court would encourage forum shopping or result in “inequitable administration of the laws.”¹³¹ Because of the narrow holding in *Hanna*, many courts continue to look beyond *Hanna* for guidance.¹³² Regardless of whether a federal court applies *Byrd* or *Hanna*, the court would probably send the issue of equitable estoppel to the jury because of the federal system’s strong interest in submitting cases to the jury.¹³³

VI. CONCLUSION

South Carolina practitioners should be wary of continuing pre-filing negotiations as the statute of limitations period runs out. Under South Carolina law, reliance on settlement negotiations will not defeat a statute of limitations defense. As a result, practitioners should protect their clients by seeking an express agreement from the opposing party during pre-filing settlement negotiations that the opposing party will not assert a statute of limitations defense if a suit must be ultimately filed. If this protection is not feasible, the practitioner should file suit prior to the running of the statute of limitations to preserve the claim. An attorney who delays filing suit under these circumstances may face an unsympathetic court,

125. WRIGHT & MILLER, *supra* note 122, § 2317, at 131 (footnote omitted).

126. 356 U.S. 525 (1958).

127. 380 U.S. 460 (1965).

128. *Byrd*, 356 U.S. at 537-38 (holding that the state “policy of uniform enforcement of state-created rights and obligations” must yield to the federal system’s allocation of “functions between judge and jury”).

129. *Id.* at 539 (quoting *Herron v. Southern Pac. Co.*, 283 U.S. 91, 94 (1931)).

130. *Hanna*, 380 U.S. at 473-74.

131. *Id.* at 467-69.

132. See *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 333 (7th Cir. 1994) (citing *Byrd* and holding that “[w]hether the trier of fact is a jury, a judge, or a magistrate judge . . . is a subject for the forum’s own law”); *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 64 (4th Cir. 1965) (recognizing *Hanna*, but stating that it is necessary to go on and ask “whether the [state] rule embodies important policies that would be frustrated by the application of a different federal jurisdictional rule and, if so, is this policy to be overridden because of a stronger federal policy?”).

133. *Byrd*, 356 U.S. at 538.

instead of a jury—and a malpractice suit.

Laura Wilcox Howle

IT COULDN'T HAPPEN HERE: THE ENGLISH RULE —BUT NOT IN SOUTH CAROLINA

I. INTRODUCTION

Does the United States Constitution give rise to a right of action for a violation of the Fourth Amendment?¹ In the landmark case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,² the United States Supreme Court decided that such a right does exist.³ Had a bill pending before the South Carolina General Assembly in 1997 been a law in force in New York in 1967, the United States Supreme Court may never have had the opportunity to decide *Bivens*.⁴ The South Carolina bill⁵ is designed to reduce litigation in South Carolina courts by imposing

1. The Fourth Amendment provides that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. 403 U.S. 388 (1971). In *Bivens* narcotics agents mistakenly entered Mr. Bivens's apartment and conducted an illegal search and seizure. *Id.* at 389. The United States District Court for the Eastern District of New York found that it lacked jurisdiction over the case and that no cause of action arose directly under the Fourth Amendment. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 276 F. Supp. 12 (E.D.N.Y. 1967). Furthermore, the court ruled that any appeal would be frivolous and denied the plaintiff's motion to appeal *in forma pauperis*. *Id.* at 16. The Second Circuit Court of Appeals also denied the appeal. *Bivens*, 403 U.S. at 390. Reversing the decision of the District Court, the United States Supreme Court ruled that a cause of action did indeed arise under the Fourth Amendment. *Id.* at 397-98.

3. *Bivens*, 403 U.S. at 397.

4. *See supra* note 2.

5. S. 193, 112th Gen. Assembly, 1st Sess. (S.C. 1997). Because the text of the bill may not now be readily accessible, the bill is set out below.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Sections 15-36-10 and 15-36-20 of the 1976 Code are amended to read:

"Section 15-36-10. (A) Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:

(1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; or

(2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

As used in this chapter, 'person' is defined to mean any individual, corporation, company, association, firm, partnership, society, joint stock company, and any other entity, including any governmental entity or

sanctions on parties falling within its scope. Senate bill 193 would amend the Frivolous Civil Proceedings Sanctions Act.⁶ Similar to Rule 11 of the Federal Rules of Civil Procedure,⁷ the current version of this Act requires the parties to petition the court for a fee award,⁸ and the amount of the award is left to the court's

unincorporated association of persons.

(B) Attorney's fees and costs shall be assessed under this chapter whenever a motion to dismiss for failure to state facts sufficient to constitute a cause of action, a motion for summary judgment, a motion for a directed verdict, or a motion for an involuntary nonsuit is granted in favor of the person seeking an assessment of the fees and costs.

Section 15-36-20. (A) Any person who takes part in the procurement, initiation, continuation, or defense of civil proceedings must be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 if he reasonably believes in the existence of the facts upon which his claim is based and

(1) reasonably believes that under those facts his claim may be valid under the existing or developing law; or

(2) relies upon the advice of counsel, sought in good faith and given after full disclosure of all facts within his knowledge and information which may be relevant to the cause of action; or

(3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or defense of a civil cause is not intended to merely harass or injure the other party.

(B) A proper purpose shall not be found under subsection (A) if a motion to dismiss for failure to state facts sufficient to constitute a cause of action, a motion for summary judgment, a motion for a directed verdict, or a motion for an involuntary nonsuit is granted in favor of the person seeking an assessment of the fees and costs."

SECTION 2. Section 15-36-40 of the 1976 Code is amended to read:

"Section 15-36-40. (A) In a motion filed pursuant to this chapter the aggrieved person has the burden of proving:

(1) the other party has procured, initiated, continued, or defended the civil proceedings against him;

(2) the proceedings were terminated in his favor;

(3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings;

(4) the aggrieved person has incurred attorney's fees and court costs; and

(5) the amount of the fees and costs set forth in item (4).

(B) The granting of a motion to dismiss for failure to state facts sufficient to constitute a cause of action, a motion for summary judgment, a motion for a directed verdict, or a motion for an involuntary nonsuit in favor of the person seeking an assessment of the fees and costs shall satisfy the burden provided for in subsection (A)."

SECTION 3. This act takes effect upon approval by the Governor.

Id.

6. S.C. CODE ANN. §§ 15-36-10 to -50 (Law. Co-op. Supp. 1997).

7. FED. R. CIV. P. 11.

8. S.C. CODE ANN. § 15-36-40 (Law. Co-op. Supp. 1997).

discretion.⁹ To be entitled to an award, the petitioning party must prevail.¹⁰

The passage of S. 193 would create a mechanical statute with no judicial discretion. The bill requires that the court impose the fees and costs of a lawsuit on the losing party when the judge enters judgment resulting from motions to dismiss for failure to state a claim, summary judgment, directed verdict, or involuntary nonsuit.¹¹ The bill would create a new twist to the old “English Rule.” The English Rule is an invention of English common law; its application requires the loser of a lawsuit to pay the victorious party’s attorney’s fees and costs.¹²

The purpose of this Note is to evaluate the likely benefit of the proposed legislation on South Carolina’s court system. First, this Note examines the English Rule and its impact in the United Kingdom. Second, the discussion focuses on an analysis of Alaska Rule of Civil Procedure Rule 82, a true “loser pays” rule. Third, the Note then compares the South Carolina proposal to Rule 82, the English Rule, and Rule 11 of the Federal Rules of Civil Procedure. Finally, this Note concludes with alternatives to the proposed statute.

II. BACKGROUND

A. *The Two Basic Rules*

1. *The English Rule of Loser Pays: The English Lose*

American legal reformers often advocate the English Rule, or “loser pays” system, as the solution to an overburdened American court system—a system of backlogs and overloaded dockets.¹³ The continuing use of the English Rule in a judicial structure so similar to our own offers a valuable opportunity to examine the Rule in operation. The English Rule allows the prevailing party in a lawsuit to recover legal fees, court costs, and any other related costs (such as those of expert witnesses) from the losing party.¹⁴ This practice of fee shifting allows parties to be made whole by recovering costs that they would not have borne but for the other

9. S.C. CODE ANN. § 15-36-50 (Law. Co-op. Supp. 1997).

10. S.C. CODE ANN. § 15-36-10(2) (Law. Co-op. Supp. 1997).

11. S. 193, 112th Gen. Assembly, 1st Sess. (S.C. 1997).

12. Herbert M. Kritzer, *The English Experience with the English Rule: How “Loser Pays” Works, What Difference it Makes, and What Might Happen Here 1* (Disputes Processing Research Program Working Paper No. DPRP 11-4, June 22, 1992).

13. See, e.g., *id.* at 1 n.1 (referring to former Vice President Quayle’s endorsement of a proposal to impose the English Rule in diversity cases in federal courts).

14. *Id.* at 2. Typically, costs are paid even in settlements. *Id.* at 2 n.4. But cf. John C. Evans, *England’s New Conditional Fee Agreements: How Will They Change Litigation?*, 63 DEF. COUNS. J. 376 (1996) (describing the recent changes in English law that allow contingency fees in certain types of litigation); Walter Olson & David Bernstein, *Loser Pays: Where Next?*, 55 MD.L. REV. 1161, 1165 & n.19 (1996) (noting that some British authorities are encouraging a shift to the American rule as a result of increased government expenses from programs such as legal aid).

party's actions.¹⁵ Barristers¹⁶ rarely argue over what constitutes reasonable fees because "there is a well-established set of norms as to what various aspects of legal representation should cost."¹⁷ The reasonableness of fees is one of many issues that the South Carolina courts must confront if the proposed South Carolina rule becomes law.

Ideally, the application of the English Rule would engender a true two-way fee shifting system. The reality is far different. Fee shifting systems often hold the defendant, typically large entities and not individuals, accountable for the plaintiff's fees; in contrast, plaintiffs are rarely held responsible for the defendant's expenses.¹⁸ Furthermore, the rule "takes no account of the conduct of the parties during the course of the litigation,"¹⁹ which is particularly important because the parties' conduct, especially that of the attorneys, is typically the problem cited in complaints about frivolous litigation.²⁰

Perhaps the greatest concern about the application of the English Rule is that it will deter a great many persons from bringing meritorious suits because of the possibility of being responsible for attorneys' fees and court costs that could be economically crippling.²¹ Patrick Devlin, a British Judge, noted that "[e]veryone knows, every lawyer particularly knows, that for the ordinary citizen unqualified for Legal Aid . . . a lawsuit is financially quite out of the question."²² The numbers speak for themselves. "There are 70,000 product liability suits pending annually in the United States, compared with only 200 in the United Kingdom."²³ The United Kingdom has a population of almost 59 million;²⁴ the United States population is more than 269 million.²⁵ Using these numbers, the United States has one products liability suit for every 3,700 persons, whereas the British have only one such suit for every 29,000 persons—a ratio difference of nearly eight to one. Even assuming that

15. See Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33, 36 (1996).

16. A barrister is defined as an English "advocate; a counsellor learned in the law who has been admitted to plead at the bar, and who is engaged in conducting the trial or argument of causes." BLACK'S LAW DICTIONARY 151 (6th ed. 1990).

17. Kritzer, *supra* note 12, at 2.

18. *Id.* at 3.

19. John Heaps & Kathryn Taylor, *The Abuser Pays: The Control of Unwarranted Discovery*, 41 N.Y.L. SCH. L. REV. 615, 619 (1997).

20. Telephone Interview with Senator Larry Martin, Member of the South Carolina Senate (Nov. 15, 1997). Senator Martin introduced S. 193 into the Senate in 1997.

21. Kritzer, *supra* note 12, at 3.

22. *Id.* at 3-4 (quoting PATRICK DEVLIN, THE JUDGE 69 (1979)). Plaintiffs are often supported by Legal Aid, an extensive social system that covers legal costs for eligible litigants. *Id.* at 4. As a matter of public policy, Legal Aid is not required to pay the opposing party's fees and costs. *Id.* at 5.

23. Dick Thornburgh, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 MD. L. REV. 1074, 1074 n.1 (1996).

24. U.S. Bureau of the Census, *International Data Base* (visited June 19, 1998)

<<http://www.census.gov/cgi-bin/ipc/idbsprd>>.

25. U.S. Census Bureau (last modified June 19, 1998)

<<http://www.census.gov/main/www/popclock.html>>.

the British people as a whole are less litigious than Americans, the difference in the numbers is staggering. While this Note does not discuss the cultural differences between the two nations, such a discrepancy is difficult to explain without considering the deterrent effect of the English Rule.

If the English Rule does eliminate frivolous litigation, it does so at considerable societal expense. Because “[t]hose rich enough to litigate, whether individuals or corporations, [would] have a lethal advantage” in a loser pays system, the middle and lower classes of society are at a greater risk of exploitation.²⁶ However, final judgment on the potential effect of the adoption of the English Rule in South Carolina is best withheld until its effect on an American system is examined. Fortunately, the opportunity for such an examination exists because Alaska employs a version of the English Rule.²⁷

2. *A Brief History of the American Rule*

The English Rule is not foreign to American shores. In pre-revolutionary times, the young British colonies actually followed the English Rule of loser pays.²⁸ The colonial version of fee shifting, however, differed in one important aspect: colonial authorities also regulated the maximum amount an attorney could charge for his services.²⁹ Following the American Revolution, opposition to government regulation led to the repeal of caps on attorneys’ fees.³⁰ As the nineteenth century ended, courts interpreted statutes as barring the award of attorneys’ fees and so denied attorneys’ fees in awards for damages.³¹ “The term ‘American Rule’ came into use in the early twentieth century to describe the practice of requiring each side to pay its own attorneys’ fees.”³² Despite the prevalence of the American rule,³³ limited statutorily authorized fee shifting measures are now in place throughout this country.³⁴ Legislatures typically enacted these statutes to encourage, not discourage, litigation that promotes the enforcement of public policies.³⁵

26. Keith Evans, *Beware the English Rule!*, WEST LEGAL NEWS, Sept. 27, 1996, available in 1996 WL 545554.

27. ALASKA R. CIV. P. 82; see *infra* Part II.B.

28. Di Pietro & Carns, *supra* note 15, at 36-37.

29. *Id.* at 37.

30. *Id.*

31. *Id.*

32. *Id.*

33. According to *Black's Law Dictionary*, “[t]he traditional ‘American Rule’ is that attorney fees are not awardable to the winning party (i.e. each litigant must pay his own attorney fees) . . .” BLACK’S LAW DICTIONARY 82 (6th ed. 1990).

34. Di Pietro & Carns, *supra* note 15, at 37.

35. *Id.* Examples of such statutes can be found throughout civil rights, environmental, and consumer protection law. *Id.*

B. *Alaska's Rule 82: Ambiguous Results*

Alaska, through historical accident,³⁶ employs the most comprehensive loser pays statute in the United States: Alaska Rule of Civil Procedure 82.³⁷ Rule 82

36. *Id.* at 38-46. Alaska's Rule 82 dates back to the mid-1800s. *Id.* at 38. Following the purchase of the Alaskan territory from Russia, Congress declared that Oregon law would govern the new American territory. *Id.* at 37-38. Oregon laws at that time permitted the "prevailing party to recover certain costs" in some types of actions. *Id.* at 39. As the English Rule was phased out throughout the remainder of the nation, Alaska retained it as a part of its judicial system. *Id.* at 38-46.

37. ALASKA R. CIV. P. 82. The text of the rule follows.

(a) Allowance to Prevailing Party. Except as otherwise agreed to by the parties, the prevailing party in a civil case shall be awarded attorneys' fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorneys' fees to a party recovering a money judgment in a case:

	Judgment and, if Awarded, Prejudgment <u>Interest</u>		Contested Without <u>Trial</u>	
	Contested <u>With Trial</u>		Non- <u>Contested</u>	
First	\$ 25,000	20%	18%	10%
Next	\$ 75,000	10%	8%	3%
Next	\$400,000	10%	6%	2%
Over	\$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorneys' fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorneys' fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

- (A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;
- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants

shifts the amount of costs and fees to the losing party based on both the amount of judgment and prejudgment interest and on whether or not the case went to trial.³⁸ In 1996 researchers published an article summarizing an empirical study of Rule 82.³⁹ Interestingly, the researchers concluded “that attorney’s fee shifting in Alaska

from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) Motions for Attorneys’ fees. A motion is required for an award of attorneys’ fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk’s certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorneys’ fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party’s right to recover attorneys’ fees. A motion for attorneys’ fees in a default case must specify actual fees.

(d) Determination of Award. Attorneys’ fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorneys’ fees.

(e) Equitable Apportionment Under AS 09.17.080. In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorneys’ fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorneys’ fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party’s actual attorneys’ fees incurred in asserting the claim against the third-party defendant.

(f) Effect of Rule. The allowance of attorneys’ fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

Id.

38. ALASKA R. CIV. P. 82(b).

39. Di Pietro & Carns, *supra* note 15.

seldom played a significant role in civil litigation.”⁴⁰ Rule 82 was but one factor in the mix of variables used to decide how, when, and under what circumstances an action should be brought.⁴¹ Furthermore, because courts infrequently applied Rule 82, it apparently was not the deterrent to frivolous litigation that its drafters had hoped.⁴² Moreover, “[s]ixty-four percent of attorneys interviewed said that Rule 82 did not deter frivolous litigation.”⁴³ When Rule 82 did influence the decision-making process of attorneys, its effects varied.⁴⁴ Basically, when the Rule impacted the decision of whether or not to sue, the Rule generally did what its supporters (and, for that matter, its detractors) said it would do: frighten off those with weak cases.⁴⁵ However, the researchers also found that Rule 82 caused those with modest means to shy away from suing unless their cases were strong enough to predict victory.⁴⁶ Indeed, the potential application of Rule 82 sometimes actually encouraged the filing of lawsuits that might otherwise have settled.⁴⁷ For example, citing Rule 82 as the reason, one defense attorney complained that a plaintiff with a strong case filed suit without ever looking into the possibility of settlement.⁴⁸ The researchers concluded that “the three most apparent effects of Rule 82 were that it (1) discouraged some middle class parties from filing cases that either wealthy or poor plaintiffs would file, (2) discouraged some suits (or defenses) of questionable merit and (3) encouraged litigation in strong cases that might otherwise settle.”⁴⁹

III. THE SOUTH CAROLINA PROPOSAL

A. *Explaining Senate Bill 193*

On January 16, 1997,⁵⁰ the introduction of S. 193 added a unique perspective

40. *Id.* at 77.

41. *Id.* at 77-78.

42. *Id.* at 78. Rule 82 awards were made in only 10% of the state cases and 6% of federal cases. *Id.* at 78. Even when awards were imposed under the rule, only 40% of those liable for such awards ever paid. *Id.*

43. *Id.* at 81.

44. *Id.* at 79-82.

45. Di Pietro & Carns, *supra* note 15, at 79-81.

46. *Id.* at 79. The researchers found that “[f]or those who had assets to lose to an adverse attorney fee award, Rule 82 assumed greater importance, along with the strength of the case, in the decision whether to file.” *Id.*

47. *Id.* at 79.

48. *Id.* A five-year Florida experiment encountered similar results. The Florida loser pays statute applied only to medical malpractice suits, and its repeal was supported by the state medical association. Philip Shuchman, *It Isn't That the Tort Lawyers Are So Right, It's Just That the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485, 537 (1997). Researchers studying the provision found that it seemed to encourage litigation. *Id.* at 537 & n.278. Moreover, researchers found that jury verdicts were much larger in English Rule cases (mean of \$69,390) than in American Rule cases (mean of \$25,500). *Id.* n.278.

49. *Id.* at 84.

50. *Legislative News*, S.C. LAW., Mar.-Apr. 1997, at 51.

to the loser pays idea.⁵¹ Senate bill 193 authorizes the award of fees and costs to a plaintiff or defendant who wins a case on a dispositive motion.⁵² The dispositive motions outlined in S. 193 include the following: failure to state a claim upon which relief can be granted, motion for summary judgment, motion for a directed verdict, and a motion for an involuntary nonsuit.⁵³ The bill would not affect a case litigated to a verdict.

Several gaps in the proposed legislation pose considerable administrative and legal difficulties. First, no language in the bill suggests a method for determining an award of attorneys' fees. Presumably, the presiding judge would have the discretion to award reasonable attorneys' fees under generally accepted methods of determining such awards. Second, the bill does not address whether parties may stay any award of costs and fees without a bond requirement pending appeal. Finally, the proposed legislation requires the party seeking an award under S. 193 to file the motion.⁵⁴ Because the court cannot make an award of attorneys' fees on its own motion, a party with a perceived "better" case may use the possibility of an award of attorneys' fees as a bargaining chip to improve the terms of a settlement.

Senator Martin proposed the legislation to prevent big business from operating recklessly and to prevent the "gumming up of the system."⁵⁵ He stresses that his bill will allow plaintiffs with legitimate causes of action to have their "day in court."⁵⁶ However, the Senator acknowledges that passage of this type of legislation is an "uphill struggle" and so he is "open to fine tuning" the bill.⁵⁷ In the end, he believes that the opposition of the trial lawyers' lobby is likely to be strong enough to prevent the enactment of S. 193.⁵⁸

51. Only Oregon has come close to enacting a similar provision. See Olson & Bernstein, *supra* note 14, at 1178-79. The original bill "provided that in all cases in which the amount claimed was less than \$20,000 the losing party would have to reimburse the prevailing party for all reasonable attorneys' fees." *Id.* at 1178. However, the bill was substantially amended so that in its final form "a prevailing party [could] collect a maximum of \$500 in attorneys' fees, unless a party acted in bad faith or frivolously, in which case the ceiling would rise to \$5,000." *Id.* at 1179 (footnote omitted). The fee-shifting system was also completely eliminated for summary judgments. *Id.*

52. S. 193, 112th Gen. Assembly, 1st Sess. (S.C. 1997). This unusual legislation is a result of State Senator Larry Martin's personal experience with the judicial system. Telephone Interview with Senator Larry Martin, *supra* note 20. Senator Martin is the author and sponsor of S. 193. The bill was prompted by Senator Martin's experience with a summary judgment dismissal and his discovery of the English Rule while watching a news program about lawyers. *Id.*

53. S. 193, 112th Gen. Assembly, 1st Sess. (S.C. 1997).

54. *Id.*

55. Telephone Interview with Senator Larry Martin, *supra* note 20.

56. *Id.*

57. *Id.*

58. *Id.*

B. Comparisons

1. Senate Bill 193 and the English Rule

Senate Bill 193 and the English Rule are significantly different. Under S. 193, plaintiffs may suffer prejudice. For example, a court may grant a defendant's motion for summary judgment before a plaintiff has completed discovery. As a result, the defendant may delay discovery, submit a dispositive motion to the court, and then hope that the potential award of attorneys' fees will persuade the poorly funded plaintiff to voluntarily withdraw the suit. Alternatively, a court may postpone decision on a motion for summary judgment until the plaintiff has completed an extensive, but fruitless, discovery expedition so that the plaintiff had every opportunity to avoid a shift of attorneys' fees. As a result, costs of discovery may become front loaded and increase litigation costs—exactly what reformers sought to curtail.

The adoption of a modified English Rule in South Carolina would lead to greater hardship in this state than in the United Kingdom because this country has liberal discovery rules and does not have the extensive social welfare program, Legal Aid.⁵⁹ Because the poor are typically judgment proof, it is the lower middle classes that are vulnerable to exploitation under any version of the English Rule.⁶⁰ The middle-class plaintiff with a house, family, and savings has the most to lose from an adverse award of attorneys' fees.⁶¹ Therefore, when the potential of bearing the other party's litigation expenses outweighs the potential gain of a meritorious suit, lower-middle-class plaintiffs may not sue at all.⁶²

2. Senate Bill 193 and Rule 82

Senate bill 193 and Rule 82 present strikingly different approaches to the same problem. First, Rule 82's application to all civil lawsuits "[e]xcept as otherwise agreed to by the parties"⁶³ contrasts sharply with S. 193's application to dispositive motions only.⁶⁴ Second, Rule 82 operates more mechanically than S. 193. Rule 82

59. Kritzer, *supra* note 12, at 4 n.12. Legal Aid in England is a government-funded institution accessible to eligible litigants. *Id.* at 8. No American equivalent exists. Numerous American public legal service organizations exist, but none are as extensively funded as is Legal Aid. *Id.* The public defender's office is not an appropriate comparison because that office is limited solely to criminal cases.

60. Gerald Walpin, *America's Failing Civil Justice System: Can We Learn From Other Countries?*, 41 N.Y.L. SCH. L. REV. 647, 657 (1997).

61. *Id.*

62. See generally Lucian Arye Bebchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371 (1996) (conducting an economic analysis of the decision to bring an action).

63. ALASKA R. CIV. P. 82(a).

64. S. 193, 112th Gen. Assembly, 1st Sess. (S.C. 1997).

provides a schedule that guides courts in determining awards, but still allows for some variations based on certain complexities and conduct.⁶⁵ In contrast, S. 193 provides no such guidance to the judiciary; instead, the bill stipulates that certain circumstances under which the court can award attorneys' fees and costs.⁶⁶

3. *Senate Bill 193 and Rule 11 of the Federal Rules of Civil Procedure*

Rule 11 of the Federal Rules of Civil Procedure allows a court, upon the motion of a party or on its own initiative, to sanction an attorney and the attorney's firm for dilatory tactics or the bringing of a frivolous action.⁶⁷ The primary difference between this sanctioning device and S. 193 is the power granted to judges. Senate bill 193 requires a judge to award fees on a proper motion.⁶⁸ Rule 11, however, is employed solely at the judge's discretion.⁶⁹ The fees awarded under Rule 11 are limited to the amount necessary to deter like conduct.⁷⁰

IV. ALTERNATIVES TO LOSER PAYS

A number of alternatives exist to enacting S. 193. Although proponents of legal reform often decry that the 1993 amendments to Rule 11 "gutted many of [its] provisions" by lowering the penalties leveled on attorneys and raising the bar for their imposition,⁷¹ the Rule is one alternative available.⁷² Other commentators have suggested more radical reforms of the current system, many of which Congress has considered,⁷³ including the following: (1) limiting noneconomic damages,⁷⁴ (2) capping punitive awards,⁷⁵ (3) eliminating joint and several liability,⁷⁶ (4) making the "final seller of the product . . . immune from suit,"⁷⁷ (5) allowing "[p]rior governmental approval as a defense,"⁷⁸ (6) adopting a total set-off rule,⁷⁹ (7) "[r]einstat[ing] . . . the 'state of the art' defense,"⁸⁰ and finally (8) reevaluating the

65. ALASKA R. CIV. P. 82(b).

66. S. 193, 112th Gen. Assembly, 1st Sess. (S.C. 1997).

67. Fed. R. Civ. P. 11(b), (c).

68. S. 193, 112th Gen. Assembly, 1st Sess. (S.C. 1997).

69. FED. R. CIV. P. 11(c).

70. *Id.*

71. Olson & Bernstein, *supra* note 14, at 1167.

72. See Thornburgh, *supra* note 23, at 1086-87.

73. Shuchman, *supra* note 48, at 490. These bills include the Civil Justice Fairness Act of 1995, Civil Justice Reform Act of 1995, Attorney Accountability Act of 1995, Lawsuit Reform Act of 1995, Common Sense Product Liability Legal Reform Act of 1996, Product Liability Fairness Act of 1995, and the Common Sense Product Liability Reform Act. *Id.* at 493.

74. *Id.* at 488.

75. *Id.* at 488-89.

76. *Id.* at 489.

77. *Id.*

78. *Id.*

79. Shuchman, *supra* note 48, at 490.

80. *Id.*

standards of liability.⁸¹ These proposals, which endorse radical revisions of “current tort law . . . and punitive damage issues,”⁸² may “result in big accomplishments or great mistakes.”⁸³ However, a wiser approach is that of incremental change.⁸⁴ Less radical modifications, such as strengthening Rule 11 or increasing the use of the current Frivolous Civil Proceedings Sanctions Act,⁸⁵ may go a long way toward decreasing frivolous litigation without substantial effects on warranted litigation.

V. CONCLUSION

Any statutory attempt to mechanically curtail “frivolous” litigation is doomed. The judicial system, much like the operation of a democratic system, is not designed to be an efficient one. Like the criminal system’s philosophy “that it is better that ten guilty persons escape, than that one innocent suffer,”⁸⁶ the notion of restricting an individual’s access to the judicial system ought to be an anathema to every American. If the cost of a balanced and open judicial system is the continued presence of frivolous litigation, it is a small price to pay. “The prospect of ‘loser pays all’ calls into question the availability of justice.”⁸⁷ Such a rule may prevent those in a similar position to Mr. Bivens. Instead of bringing suit, they may fear to cross the threshold of the courthouse.

Keith Evans, a member of the English and California bars, has witnessed the difference between the operation of the English Rule and the American Rule:

All through history, wherever there has been a thriving democracy, there has always been a lot of litigation. The two go hand in hand and you never get one without the other. . . .

I know as well as anyone that a lot of thing need fixing in America’s legal system. Like every system of law there’s ever been, it’s very imperfect. It’s also much abused, especially by certain kinds of lawyers. But none of those shortcomings is going to be fixed by doing away with the availability of the law to the people of America. You mustn’t let “the English Rule” come to the United States—not if you value your freedoms⁸⁸

*Charles W. Branham, III**

81. *Id.*

82. *Id.*

83. *Id.* at 491.

84. *Id.*

85. S.C. CODE ANN. §§ 15-36-10 to -50 (Law. Co-op. Supp. 1997).

86. 4 WILLIAM BLACKSTONE, COMMENTARIES *358-59.

87. Heaps & Taylor, *supra* note 19, at 619.

88. Evans, *supra* note 26.

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